In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 177

SOUTHWEST ENGINEERING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Missouri (R. 7–13)[1] is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A–1–A–11) is reported at 341 F. 2d 998.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1965. The petition for a writ of certiorari was filed on May 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the printed record in the Court of Appeals, copies of which have been filed in this Court.

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QUESTION PRESENTED

Whether a provision in a government construction contract specifying the amount of liquidated damages to be paid for each day's delay in completion not caused by the government is enforceable in the absence of a showing of actual damage.

STATEMENT

Petitioner brought this action against the United States under 28 U.S.C. 1346(a) to recover $8,300 withheld by the government as liquidated damages because of the petitioner's delay in completing four construction projects. The government admitted the full performance of the projects but counterclaimed for liquidated damages because the projects were not completed within the prescribed time. In reply, petitioner admitted the projects were not timely completed but denied that the government was entitled to liquidated damages because, *inter alia*, the government suffered no actual damages (Pet. App. A–3). Both courts below rejected petitioner's contention and held that the government, pursuant to its contract, had properly assessed liquidated damages (Pet. App. A–11, R. 12).

The relevant facts are undisputed and were summarized by the court of appeals (Pet. App. A–1–3). In 1957, petitioner and the United States entered into three contracts under which petitioner was to construct for the Civil Aeronautics Administration three V.O.R. radio facilities at Readsville, Blackwater, and Maryland Heights, Missouri, and a high intensity approach light lane at Lambert Field, Missouri. Each

contract fixed a completion date and provided for liquidated damages on a per diem basis for each day's delay beyond the contracted completion date. The agreed liquidated damages were $50 per day on the three V.O.R. radio facilities and $100 per day on the Lambert Field project. Each contract contained the general provision that petitioner was not to be charged with delays due to specified causes beyond its control, including acts of the government. Within ten days from the beginning of any such delay, petitioner was to notify the contracting officer in writing of the cause of the delay. The contracting officer was to ascertain the facts and extent of the delay and extend the time for completing the work when, in his judgment, such an extension was justified. His findings were to be final, subject only to appeal to the head of the department.

The Blackwater project was completed 97 days late. Administrative appeals resulted in extensions by the Civil Aeronautics Administration because of government delay, and, later on, in a remission of $4,200 liquidated damages by the Comptroller General because of late delivery of government-furnished materials. This left $550 (11 days) withheld as liquidated damages. The Readsville project was completed 84 days late. Administrative appeals resulted in a three day extension by the C.A.A., leaving $4,050 (81 days) withheld as liquidated damages. The Maryland Heights project was completed 48 days late. On administrative appeal, the C.A.A. granted a fourteen day extension, leaving $1,700 (34 days) withheld as liquidated damages. The Lambert Field project was

completed 54 days late. On administrative appeal, the C.A.A. granted 34 days extension, leaving $2,000 (20 days) withheld as liquidated damages.

The parties stipulated that, although "each project was not completed until after the date prescribed in its contract, [the government] suffered no actual damage on any project." The government nonetheless withheld the liquidated damages for delay provided in the contracts after relieving the petitioner from paying damages for excusable delays as administratively determined.

This suit followed. On a motion for summary judgment, the district court rejected petitioner's contention that actual damages are necessary and upheld the government's claim to liquidated damage (R. 9, 12). The court of appeals affirmed. It held the test to be whether "the liquidated damage provisions of the contracts here involved were reasonable when viewed in the light of circumstances existing at the time the contract was entered into" and not "when the contract was breached or at some other subsequent time." (Pet. App. A–11, A–7.)

ARGUMENT

The decision below is correct. It is in accord with the decisions of this Court upholding the validity and enforceability of "liquidated damages" provisions in government contracts when they are fair and reasonable attempts to fix just compensation for the anticipated delay which might result from a breach of contract. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151, 153; *Priebe and Sons* v. *United States*, 332 U.S. 407,

411; *Robinson* v. *United States,* 261 U.S. 486; *Wise* v. *United States,* 249 U.S. 361, 365; *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 121. There is no conflict of decisions among the courts of appeals with respect to the interpretation of the liquidated damages provisions of government contracts. Further review by this Court is, therefore, not warranted.

1. Petitioner's chief contention is that the liquidated damages provision of a government contract may be enforced only in those cases in which the government has suffered actual damages. Its premise is that otherwise the provision would exact a penalty. A similar contention was expressly rejected by this Court in *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 153, where the Court pointed out that "the fact that no damages are shown is not fatal" to a claim for liquidated damages. And see *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 120–121, where a "finding that no damages in fact flowed from the failure to deliver on time" was held not to "affect the meaning of this clause as used in the contract nor render its language substantially worthless for any purpose of security for the proper performance of the contract as to time of delivery."

The contract is viewed as of the time when the parties entered into it. *Priebe and Sons* v. *United States,* 332 U.S. 407, 412; *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 119; *Wise* v. *United States,* 249 U.S. 361, 365-367, see also *Frick Co.* v. *Rubel Corp.,* 62 F. 2d 765 (C.A. 2). That it turns out that there is no actual damage is immaterial. *Rex Trailer Co.* v. *United States, United States* v. *Bethlehem*

Steel Co., supra, United States v. *Le Roy Dyal Co.*, 186 F. 2d 460, 462 (C.A. 3), certiorari denied, 341 U.S. 926. Accordingly, in determining whether a provision for liquidated damages is in fact a penalty, it is necessary to seek the intention of the parties in the light of the circumstances existing at the time they entered into the contract. *United States* v. *Bethlehem Steel Co., supra,* 205 U.S. at 119, *Sun Printing and Publishing Ass'n* v. *Moore,* 183 U.S. 642, 669, *Frick Co.* v. *Rubel Corp.,* 62 F. 2d 765, 768 (C.A. 2). And when "such intention is ascertained it is ordinarily the duty of the court to carry it out." *United States* v. *Bethlehem Steel Co., supra,* 205 U.S. at 119.

Applying these principles to the instant case, the court of appeals found "no showing that the liquidated damages for delay provided for are beyond damages reasonably contemplated by the parties at the time of the contract." (Pet. App. A–6.) Even petitioners do not suggest that the liquidated damage figure of $50 per day in the construction of the three V.O.R. radio facilities and $100 per day for the high intensity approach lane at Lambert Field was an unreasonable advance estimation of the extent of the damage that the government might suffer in the event of delay.[2]

[2] Although, as pointed out by the court of appeals, the agreed record is highly condensed and does not show the substituted contract price of the various projects (Pet. App. A–6), the

2. The decision below is not in necessary conflict with decisions by the Fifth and Ninth Circuits. Both courts recognized the principles stated above and sought to ascertain "the intention of the parties." *Massman Construction Co.* v. *City Council of Greenville, Miss.*, 147 F. 2d 925, 927 (C.A. 5), *Rispin* v. *Midnight Oil Co.*, 291 Fed. 481, 484 (C.A. 9). Although the contract used the nomenclature "liquidated damages" in *Massman Construction Co.*, the court thought it clear the parties intended only to stipulate the *amount* of the actual damages, should they in fact ensue from delay. 147 F. 2d at 927. Here, on the contrary, the court concluded that the contracting parties meant to settle (in accordance with reasonable expectations) both the *existence* and the amount of damages in the event of delay in completion. Although holding that a liquidated damages clause would not be enforced without actual damages in *Rispin*, the Ninth Circuit expressly stated that it did not there determine whether the claim was for liquidated damages or a penalty and recognized that in some circumstances such a clause might be valid depending upon the entire agreement, "the nature of the subject-matter involved and the purpose for which the agreement was made." 291 Fed. at 484.

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estimated costs of construction for the various projects was as follows:

"V.O.R. radio facilities at Readsville and Blackwater, $37,500 (contract No. C 3ca–1038–A).

"V.O.R. radio facilities at Maryland Heights, $23,815 (contract No. C 3ca–1039–A).

"High Intensity Approach Lane at Lambert Field, $53,058 (contract No. C 3ca–1182–A)."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Repectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
JACK H. WEINER,
Attorneys.

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